

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Mattern,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Lackawanna County and	:	
Executive Claims Administration,	:	
Inc.),	:	No. 423 C.D. 2008
	:	Submitted: June 20, 2008
Respondents	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE MCGINLEY

FILED: August 12, 2008

David Mattern (Claimant) petitions for review from the order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) who granted Claimant's Claim Petition in part and terminated his compensation benefits as of February 9, 2006.

Claimant was working as a corrections officer at the Lackawanna County Prison (Employer) when he was injured on October 12, 2005. He held that job for over eleven years prior to his injury. Claimant had previously suffered a prior work-related injury to his back as a result of a fight with another corrections officer, and that compensation claim was resolved by a Compromise and Release Agreement.

While at work on October 12, 2005, Claimant attempted to sit in a hydraulic chair which gave way. Claimant fell backward and injured his back. Claimant indicated that this event was witnessed by his co-worker, James Joseph Walsh, Jr. (Walsh), who filed an incident report.

Claimant petitioned for benefits on November 23, 2005, and sought lost wages for total disability beginning October 12, 2005, and continuing into the future. Claimant also sought payment of medical bills and attorney's fees. Employer answered and denied all allegations.

Before the WCJ, Claimant explained the circumstances surrounding his back injury, as well as the symptoms he experienced. Claimant also acknowledged the previous back injury. Notes of Testimony, December 13, 2005 (N.T.), at 5-6; Reproduced Record (R.R.) at 35a-36a.

Claimant presented the deposition testimony of Walsh. Walsh testified that:

I remember seeing out of the corner of my eye the chair giving-way and Dave (Claimant), more or less, going back and catching himself.

....

The wheels – the one wheel was kind of – I guess it fell off. It was falling off or it was broken already. But, I mean, it, more or less, you know, gave-way back where Dave had to catch himself before he fell.

....

I am almost a hundred percent sure that I did complete (an Incident Report).

....

I didn't think it was that serious at first. I mean, I started laughing. I said, 'Dave, are you all right?' And at that point he said, 'no'. And that's it.

He gave that grimacing (Witness grunted).

Deposition of James Joseph Walsh, Jr., November 7, 2006, at 7-9; R.R. at 103a-105a.

Claimant also presented the deposition testimony of Paul W. Horchos, D.O. (Dr. Horchos), board certified in physical medicine and rehabilitation and Claimant's treating physician. Dr. Horchos described his examination of Claimant on October 14, 2005, and noted the symptoms that Claimant presented. Dr. Horchos also noted the previous back injury that Claimant had suffered while at work, and stated that he was Claimant's treating physician for that injury as well. Deposition of Paul W. Horchos, M.D., June 28, 2006 (Dr. Horchos Deposition), at 10; R.R. at 181a. On Claimant's visit to his office after the October 12, 2005, injury, Claimant:

Told me that he has intensification of his back pain. He told me that it is now going down his bilateral lower extremities.

He told me that he is unable to stand upright since the incident and feels that he's got some weakness of the lower extremities, especially on the left.

....

He was forward flexed. Walking was very slow, somewhat painful. He had tenderness over his lower

lumbar regions, particularly the lower lumbar paraspinal muscles.

He was only able to bend about 50 percent of normal. As he tried to come back up to a neutral position, he would get some increased tingling and burning pain down his legs.

His motor strength was normal with manual muscle testing, and his deep tendon reflexes were normal. He had straight leg raising abnormalities in both legs on clinical examination that day.

....

(My impression was that he had) Lumbar discogenic disease with new onset of right radicular symptoms, *in addition to his previous left radicular symptoms*; lumbar spondylolisthesis, L5-S1; lumbar facet joint arthroscopy and lumbar spondylosis.

Dr. Horchos Deposition at 7-9; R.R. at 178a-180a.

Dr. Horchos discussed Claimant's visit to his office on September 9, 2005, shortly before the injury now in question occurred. This visit was made in the course of treatment for Claimant's original work injury stemming from the fight. Dr. Horchos then compared Claimant's symptoms on that visit to his symptoms on the October 14, 2005, visit that took place two days after Claimant's fall from the hydraulic chair. Dr. Horchos noted significant differences:

Straight leg raising was positive on the left and negative on the right side (prior to the chair incident).

....

(The fact that it was positive on both sides after the chair incident) indicates that there is irritation of the nerve root on the right side as well as on the left side.

Dr. Horchos Deposition at 14-15; R.R. at 185a-186a.

Dr. Horchos opined that Claimant had been injured while working for Employer on October 12, 2005. Claimant had surgery on May 23, 2006, on the recommendation of Dr. Horchos, who noted “That (surgery) was necessary *specifically regarding the October injury* when he fell off the chair.”

Dr. Horchos Deposition at 29; R.R. at 200a. (Emphasis added).

Dr. Horchos opined that Claimant would continue to be disabled for a period of three to six months following the surgery. Dr. Horchos Deposition at 30; R.R. at 201a.

Employer presented the deposition testimony of Neil Kahanovitz, M.D. (Dr. Kahanovitz), a board-certified orthopedic surgeon. Dr. Kahanovitz examined Claimant on February 9, 2006, upon Employer’s request. In regard to his findings during that examination, Dr. Kahanovitz noted:

(Claimant’s) physical examination revealed a well-developed, overweight white male. On standing there was a normal thoracic kyphosis and normal lumbar lordosis which are the normal curvatures as viewed from the side clinically. There was no pain to palpation in the midline or paraspinal muscles.

Extension or bending backwards to 10 degrees elicited pain at the lumbosacral junction and proximal buttocks bilaterally. Forward flexion to the proximal thigh elicited similar symptoms slightly worse but with no radiation. Manual motor testing of the lower extremities was normal.

Sensation to the light touch of the lower extremities was normal except for a subjective decrease over the first dorsal web space on the left. Deep tendon reflexes were normal. No abnormal reflexes were elicited. There was a negative straight leg raising, bowstring and Lasegue bilaterally to 90 degrees.

(This told me) that he had subjective pain complaints in the low back, but there was no evidence of any significant neurological finding on physical examination that would indicate any specific nerve root impingement or compression.

....

And more importantly, there was no evidence that there was any impingement or irritation or inflammation of any of the components of the sciatic nerve which was demonstrated by the negative straight leg raising, bowstring and Lasegue tests.

Deposition of Neil Kahanovitz, M.D., September 14, 2006 (Dr. Kahanovitz Deposition), at 22-23, R.R. at 263a-264a.

Dr. Kahanovitz also discussed his review of X-rays taken of Claimant's back on November 8, 2005:

MRI films dated 11/8/05 were reviewed which revealed an L5-S1 Grade I spondylolisthesis with a lytic defect of the L-5 pars and mild to moderate facet degenerative changes of a longstanding nature at L5-S1 as well as minimal midline bulging at L4-5. There was no evidence of an acute injury.

X-rays of the lumbar spine done on 11/8/05 were reviewed. They also revealed a lytic defect at the L-5 level on S-1 as well as a Grade I spondylolisthesis with longstanding degenerative changes of the L5-S1 disc

space and three to four millimeters of motion on flexion/extension views.

These findings were consistent with what I had discussed earlier as a developmental or spondylolytic spondylolisthesis which *had been present for many years, most likely since his adolescence, that had become degenerative in nature over the ensuing years.*

N.T. of Dr. Kahanovitz at 23-24; R.R. at 264a-265a. (Emphasis added).

Dr. Kahanovitz opined that Claimant suffered from a longstanding, developmental condition that had become symptomatic to a disabling degree as early as 2001. N.T. of Dr. Kahanovitz at 29; R.R. at 270a. Dr. Kahanovitz also opined that Claimant had indeed suffered an injury while at work on October 12, 2005, but that the injury was but one of many aggravations of Claimant's spondylolisthesis condition. N.T. of Dr. Kahanovitz at 30; R.R. at 271a. Dr. Kahanovitz stated that Claimant did require surgery for ongoing symptomatic spondylolisthesis, which he did ultimately undergo, but that this had nothing to do with the work injury of October 12, 2005. N.T. of Dr. Kahanovitz at 31; R.R. at 272a.

The WCJ found that Claimant did in fact suffer a work injury on October 12, 2005, and awarded him disability benefits. However, the WCJ found that Claimant had recovered from the injury by February 9, 2006,¹ and terminated the benefits as of that date. The WCJ made the following relevant findings of fact:

¹ The Board correctly noted that “[a]lthough the WCJ used February 6, 2006 in his Order, he found and concluded that Claimant fully recovered as of February 9, 2006, and that date is consistent with the date of Dr. Kahanovitz’s examination.”

11. After reviewing the evidence presented by both parties, this WCJ finds the testimony of the claimant to be credible, corroborated by both Drs. Horchos and Kahanovitz that claimant sustained a work related injury on October 12, 2005, consisting of an aggravation of a preexisting L5-S1 spondylolisthesis. The nature and extent of the injury caused the claimant to be unable to perform his usual occupation as a result of the aggravation of his preexisting spondylolisthesis from which he has recovered as of February 2006, the date of Dr. Kahanovitz's examination. This WCJ was neither impressed nor persuaded by the testimony of Dr. Horchos nor the claimant that the claimant was required to undergo surgery as a result of the work injury of October 2005. On the contrary, this WCJ observes and notes for the record that the claimant had an extensive pre October 2005, history of treatment with Dr. Horchos related to the injury of December 2001, with claimant continuing to treat, medicated and examined by Dr. Horchos until the date of the injury in October 2005.

12. This WCJ cannot accept and will specifically reject the testimony of Dr. Horchos as being speculative and conjectural that claimant's disability from performing his usual occupation as a correctional officer and requiring him to undergo surgery with Dr. Gillick (Claimant's surgeon) in May of 2006, were the result of the work injury of October 2005. Dr. Horchos' opinions cannot be accepted as credible based upon his extensive treatment of the claimant prior to the work injury of October 2005.

WCJ's Decision, June 1, 2007, Findings of Fact Nos. 11 & 12 at 5-6; R.R. at 28a-29a.

Claimant then appealed that portion of the WCJ's decision the terminated Claimant's benefits to the Board. The Board affirmed the WCJ's decision to terminate Claimant's benefits effective February 9, 2006.

Claimant petitioned for review with this Court, and seeks reversal only as to that portion of the WCJ's decision terminating Claimant's benefits on February 9, 2006.

Claimant contends that the Board erred when it failed to reverse the WCJ's decision to terminate Claimant's benefits when substantial evidence of record demonstrated that Claimant suffered ongoing disability from his work related injury.² Claimant asserts that objective evidence of record shows that Claimant did not have radicular symptoms in his right lower extremity prior to the October 2005 injury. Claimant contends that, during his visit to Dr. Horchos one month before the injury, Dr. Horchos performed a straight leg test and found that Claimant was suffering from only left sided radicular symptoms. Since the work injury, Claimant experienced constant right sided lower extremity radicular symptoms as well.

A WCJ may order a termination of benefits in the context of a claim petition if it is determined that a claimant is only entitled to benefits for a closed period of time. Thomas v. Workmen's Compensation Appeal Board (George's Painting Contractors), 629 A.2d 251 (Pa. Cmwlth. 1993). A WCJ is free to make a

² This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

finding terminating benefits when the evidence supports such a finding, even if a Termination Petition has not been filed by an employer. Connor v. Workers' Compensation Appeal Board (Super Suckers, Inc.), 624 A.2d 757 (Pa. Cmwlth. 1993).

In the present case, the WCJ determined that Claimant was injured while at work on October 12, 2005. The WCJ also determined that the injury resolved. The WCJ found the surgery that Claimant underwent was to correct an issue with his back that predated the October 2005 injury. The WCJ based this decision on the testimony of Dr. Kahanovitz, whom the WCJ found more credible and believable than Dr. Horchos. Dr. Kahanovitz opined that Claimant's injury was merely one in a sequence of episodes dealing with a condition Claimant had since adolescence. The WCJ specifically rejected Dr. Horchos' assertion that the surgery and recovery that Claimant underwent was a direct result of the October 2005 injury.

The law is well settled that the WCJ has complete discretion as to the credibility of witnesses. Sherrod v. Workmen's Compensation Appeal Board (Thoroughgood, Inc.), 666 A.2d 383 (Pa. Cmwlth. 1995).

Here, Dr. Kahanovitz's testimony constituted sufficient and competent medical evidence upon which the WCJ rendered his decision. Because the WCJ's decision was based upon this testimony, it is clear that Claimant's assertion that the decision was not based upon substantial evidence is without merit. The WCJ simply rejected the testimony of Claimant's doctor.

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

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No. 423 C.D. 2008

ORDER

AND NOW, this 12th day of August, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

BERNARD L. McGINLEY, Judge